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IN THE

Supreme Court of the United States

October Term, 1961

No. 844

LOUIS F. FOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH JUDICIAL CIRCUIT

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INDEX

	Page
Petition for a Writ of Certiorari	1
Citations of Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting The Writ	5
Conclusion	8
Certificate of Service	9

Cases Cited

Billeci v. U. S., 184 F. 2d 394	7
Carney v. U. S., 295 F. 606	7
Dennis v. U. S., 339 U. S. 162	5
Foster v. U. S., 188 F. 305	7
Morford v. U. S., 339 U. S. 258	5
Wagner v. U. S., 264 F. 2d 524	5
Williams v. U. S., 93 F. 2d 605	7

Statutes

Title 18, Rule 24 (a), U.S.C.A.	2, 5, 6
Title 18, 657, U.S.C.A.	3

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Louis F. Fox, *Petitioner*,

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United States of America, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Judicial Circuit

Petitioner, Louis F. Fox, Jr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on the 7th day of December, 1961, and its denial of Petitioner's motion for re-hearing entered by said court on the 8th day of February, 1962.

CITATIONS OF OPINIONS BELOW

The opinion of the Court of Appeals printed in Appendix B, affirms the convictions and judgment on all counts of the indictment.

JURISDICTION

Judgment of the Court of Appeals was timely entered on the 7th day of December, 1961, page 2a, *infra*. Timely petition for re-hearing was filed and was then denied on the 8th day of February, 1962. Jurisdiction of this Court is invoked under Title 28, U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

The prosecution of Petitioner for alleged violations of Title 18, Section 657, U.S.C.A., under Criminal Indictment numbered 6451, includes four (4) counts of embezzlement, and presents the following questions:

I.

Does the practice of the District Courts of the Southern District of Texas in uniformly denying the Defendant the right to limited interrogation of the prospective jurors violate the letter and intent of Rule 24(a), Title 18, U.S.C.A.

II.

Does the comments and remarks of the trial court to the jury, during the charge, exceed the discretionary authority of the said court by asserting undue influence on the jury.

III.

Do the comments and instructions by the trial court, to the jury during their deliberations on the case, constitute prejudicial error.

STATUTES INVOLVED

The statutes involved in the questions pending before this Honorable Court are as follows: Title 18, Rule 24(a)

U.S.C.A., cited as Appendix A, Page 1a; Title 18, 657.
U.S.C.A., cited as Appendix A, Page 1a.

STATEMENT

The Petitioner was convicted in the United States District Court for the Galveston Division of the Southern District of Texas, under an indictment charging a violation of Title 18, Section 657, U.S.C.A.

The charges allege certain transactions constituting embezzlement of funds on four (4) loan transactions, wherein the discount fee or charge was received by Petitioner, while allegedly belonging to the association of which he was President, and then converted to his own use.

The case was tried by jury after the court refused the Petitioner the right to limited examination of the prospective jurors, under a local district practice of denying without consideration, the request for such right.

After the conclusion of the presentation of evidence in the case the court, during his charge to the jury, made an extensive summation of the government's proof, but did not discuss the proof submitted by the defense.

After instruction, the jury retired to consider their verdict. After deliberation of some four hours, the court had the jury return to the court room and asked if they had reached a verdict. The answer was negative.

The court commented on this failure and the jury withdrew until 5:05 P. M. or some two hours later and returned, reporting it was hopelessly deadlocked.

At this time the court released the jury for three days. When they returned to deliberate on the fourth day, the court again made numerous remarks to the jury.

After additional consideration, the jurors finally arrived at a verdict of guilt.

The comments of the court to the jury were as follows:

(a) After some five hours deliberation, the jury returned and the court said: "You ladies and gentlemen have had our case under consideration for some five or six hours, now you have not reached a verdict?" The Foreman: "Your Honor, we have not." The Court: "Well I am somewhat surprised at that fact. It was a case I thought there was very little dispute in the evidence, and I thought that you all probably would have come to a conclusion prior to this time. The Court continued: Well, suppose you take a recess — and each of you jurors, it occurs to me, should carefully examine his own views in the light of what the argument, and so forth, which the jurors of the other view may advance, and see if you can't arrive at a unanimous verdict."

(b) After the three (3) day recess the jury returned and the Court said: "This case presents little conflict in the evidence, I believe, and I am very reluctant to declare a mistrial, unless it becomes necessary that I do. So, in view of the fact that we can't deliberate tomorrow, I am telling you now, that if you can't reach a verdict, I will discharge you this evening, and not keep you together so long that you may feel that you might have to surrender your views before you are going to be excused. However, we will work this evening and to a fairly late hour, if it is necessary for you all to give this matter the careful consideration that I am sure you wish."

These remarks were highly prejudicial to the Petitioner.

Petitioner made a motion for new trial on these grounds, which was promptly denied.

The appeal was timely submitted and denied as reflected herein.

REASONS FOR GRANTING THE WRIT

The denial of Petitioner's pre-trial motion pursuant to and under the provisions of Rule 24(a), Title 18, U.S.C.A. requesting the trial court to allow counsel for the defense the right to interrogate the individual jurors on voir dire because of the *agreed practice of the district not to consider the motion* was error.

The trial court in its denial stated:

> "Now let's see, Mr. Frioux, you have asked to interrogate the jurors personally. We, as you know, follow the contrary practice."

The Court, in its denial of the Petitioner's motion, made a realistic inquiry impossible. The brief, general questions to the panel make it impossible for an intelligent exercise of the Defendant's right to challenge for cause, as well as rendering the peremptory challenge a matter of rank speculation.

While there is the undisputed discretionary power vested in the trial judge under Rule 24(a), the action of the local district, in adopting the uniform procedure of denying the right to even limited interrogation of the jurors to *all defendants*, circumvents the true import and purpose of the rule.

The preservation of the right, and opportunity to prove actual bias, is a guarantee of the defendant to an impartial trial by jury. *See Dennis* v. *U. S.*, 339 U.S. 162; *Morford* v. *U. S.*, 339 U.S. 258; *Wagner* v. *U. S.*, 264 F. 2d 524.

The Fifth Circuit, in the *Spells* case[1] held in essence with the view Petitioner now presents to the Court; al-

[1] Spells v. U.S. (5 Cir., Tex.), 262 F. 2d 699, cert. den. 360 U.S. 920.

though the Fifth Circuit did not consider its previously stated view controlling in this cause.

A defendant can never adequately determine the intrinsic and intangible factors leading to a particular jury's decision.

The time to properly determine the existence of any disqualification was on voir dire.

The adoption of this district procedure eliminated the right to "discretion" afforded by the Rule. (T. 18, R. 24 I. S. C. A.)

The record is devoid of any challenge for cause, and counsel for Petitioner has rarely seen a juror in a Federal venire stand up in front of the entire panel and admit to prejudice of any sort.

The practice of arbitrarily denying the individual trial judge the right to exercise his discretion on each case, after considering the type case, the atmosphere of the community, and the make up of the panel, effectively circumvents and makes inapplicable the intent of Congress in allowing each judge this discretionary authority.

Petitioners will acknowledge that unlimited interrogation, or questioning, would be just as undesirable as allowing no interrogation.

Even hearing a juror speak is of some importance to trial counsel as he tried to look at faces, at listed occupations, and then began the impossible mental gymnastic of trying to select a jury which enters the trial with an open mind free from prejudice.

This district practice in actuality, amounts to the denial per se, without independent consideration, of what every defense counsel considers a very vital and necessary substantive trial right.

U. S. ex. rel. Darcy v. Handy, 130 F. Supp. 270.

Question II. The trial court's comments to the jury, wherein the court felt compelled to "explain" to the jury just what the prosecution had proved or tried to prove, could have had no other effect, particularly when viewed in conjunction with the later remarks to the jury, during its deliberations, than to indicate to the jury that he felt that there was no basis in fact, in failing to quickly arrive at a verdict of guilty.

The trial court need not, of course, summarize the evidence; but if he does so, the summary must be fair and adequate, and must not be one-sided. *Williams* v. *U. S.*, 93 F. 2d 665, *Billeci* v. *U. S.*, 184 F. 2d 394; *Carney* v. *U. S.*, 295 F. 606.

Even though this power is discretionary yet — "the greatest caution should be used in the exercise of this power, and the jury should *be free* and untrammeled in the determination of the questions of fact, which are to be passed on by them." *Foster* v. *U. S.*, 188 F. 305.

There is no dispute that it is of the utmost importance that the charge, instructions, and comments thereon do not give undue prominence to a part of the charge.[3]

The attitude of disinterestedness, which is the foundation of a fair and impartial trial must be maintained by the trial court.[4]

While the power to comment, and or summarize is discretionary, the trial judge must avoid becoming an advocate of either side of the pending controversy, which is required by the conflict of the evidence, to be submitted to the jury is a fundamental and essential rule of especial importance in a criminal case.[5]

[3] Perovich v. U.S. 205 U.S. 86; Colburn v. U.S., 233 F. 59 cert den. 239 U.S. 643.
[4] Williams, Supra.
[5] Alder v. U.S.; 182 F. 2d 464.

In the instant case, the attention of the court is directed to the comments and opinion of the trial court, as shown in the record. (see R. 308, 309, 310, 312 and 313)

The summarization of the government's position, coupled with the failure to summarize the evidence favorable to Petitioner, made the Court an advocate of the prosecution.

A careful reading of the entire summarization will make clear to the court Petitioner's position thereto.

Question III. When standing alone, the comments to the jury do not have their full impact; but when considered along with the comments, remarks and summarization of the case for the prosecution, the real impact of the court's influence can readily be felt.

The court's obvious annoyance with the jury's failure to quickly arrive at a verdict; his subsequent remarks that the evidence was clear, and that he expected them to reconsider after they reported hopelessly deadlocked shows the full impact of his influence on this jury.

CONCLUSION

A. Because of the seriousness to all defendants who stand trial, to have a fair and impartial jury, it is necessary that the court clearly indicate its view on the right of various districts to adopt local rules eliminating the *discretionary right* of the *individual trial judge* to grant or deny full or limited interrogation, after consideration of the facts incident to each individual case.

Petitioner submits this practice constitutes a direct avoidance of this important and critical discretionary power of the individual court, which place defendants in a position of extreme prejudice, and constitutes reversible error.

B. The remarks of the trial court taken together with his comment and conduct concerning the jury during deliberа-

tion rendered a fair and impartial consideration impossible and constituted error.

Respectfully submitted,

.....

C. ANTHONY FRILOUX, JR.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to Woodrow Seals, United States Attorney, 218 Post Office Building, Houston 2, Texas, and to Solicitor General, Department of Justice, Washington 25, D.C., postage prepaid, on this ..... day of March, 1962.

.....

C. ANTHONY FRILOUX, JR.

APPENDIX A

A. Rule 24(a) covering trial jurors provides in part:

(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

B. 654. Officer or employee of United States converting property of another

Whoever, being an officer or employee of the United States or of any department or agency thereof, embezzles or wrongfully converts to his own use the money or property of another which comes into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or employee, shall be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both; but if the sum embezzled is $100 or less, he shall . . . .

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH DISTRICT

No. 18820

LOUIS F. FOX, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(December 7, 1961)

Before TUTTLE, Chief Judge, and HUTCHESON and RIVES, Circuit Judges.

PER CURIAM: The appeal presents no showing of substantial error, and for the reasons hereafter stated, we affirm the judgment of the trial court.

Appellant was indicted, tried before a jury, and convicted on four counts of embezzlement in violation of 18 U. S. C. 657 in the United States District Court for the Southern District of Texas. He was sentenced to imprisonment for a period of thirteen months and fined eight thousand dollars.

Errors assigned are: the failure of the trial court to allow appellant's counsel to interrogate individual jurors; the alleged failure of the trial court to fairly and adequately sum up the appellant's theory of defense; alleged prejudicial comments and instructions to the jury during deliberation; and insufficiency of the evidence to support the jury verdict.

The procedure to be followed in the examination of jurors is within the discretion of the trial judge. Fed. R. Crim. P. 24 (a). The latter rule has been adopted by the United States District Court for the Southern District of Texas in its Rule 32. The trial judge in this case, in refusing permission to interrogate the jurors individually, neither abused his discretion, nor, in stating: "We . . . follow the contrary practice [to personal interrogation of jurors]", did he assert the existence of a rule for the Southern District of Texas contrary to its Rule 32 and Fed. R. Crim. P. 24 (a). In any event, no prejudice to appellant is shown.

The comments and charge of the trial judge were fair and impartial and were not erroneous. The same is true of the comments and instructions to the jury during its deliberation. The verdict of the jury is fully supported by the evidence.

The judgment is

AFFIRMED.